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## Religious State Constitution Preambles

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# Religious State Constitution Preambles

Allan W. Vestal\*

## ABSTRACT

The nation would benefit from Americans becoming more tolerant and respectful of the faith decisions of others. One modest step toward such a reconciliation would be to amend the religiously exclusionary language of almost all of our state constitution preambles.

Forty-five of the states have preambles that include references to the Christian God. Typical is the Pennsylvania provision: “We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.” Such language either excludes non-Christians from the class of “we, the people,” or ascribes to such citizens gratitude to a deity in which they do not believe.

The nation has changed dramatically since the religious preambles were inserted in many state constitutions as a product of the Second Great Awakening of the first half of the 19th Century. Today, such preambles place around three in ten citizens at a remove on the basis of their religious beliefs. The religious preambles were never appropriate, even when those with disfavored religious beliefs were small in number. The inappropriateness of the exclusionary preambles is even more evident in today’s religiously diverse nation.

The religious preambles are disrespectful of citizens with disfavored religious beliefs. They have been used to justify practices – the placement of religious monuments in government space, the censorship of films, sectarian religious instruction in public schools, and the denial of tax preferences to disfavored religious groups – that have been held to violate the Establishment Clause. And by seeming to offer support to the fallacious belief that this is an officially Christian nation, the religious preambles foster intolerance and bigotry. As a prudential matter, to foster national reconciliation on matters of religious faith, they should be amended.

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#### I. INTRODUCTION

Our nation would benefit from reconciliation as to matters of religious belief, by becoming more tolerant and respectful of the faith decisions of others. One step toward such a reconciliation is illustrated by walking through Arlington National Cemetery.

The newest part of Arlington is Section 60, where the fallen from Iraq and Afghanistan rest.<sup>1</sup> Grave 7973 in Section 60 is the resting place of Yihjyh L. “Eddie” Chen from Texas, who served as a Sergeant in the Army during Operation Iraqi Freedom. He was killed in action in Baghdad when his unit came under rocket-propelled grenade and small arms fire, posthumously earning a Purple Heart and a Bronze Star. The white stone marking his grave bears the Nine-Pointed Star, indicating his Bahá’i faith.<sup>2</sup>

Just steps away is Grave 7969, the resting place of Alan Dinh Lam, from North Carolina, who served as a Lance Corporal in the Marine

1. Simon Worrall, *Section 60 of Arlington National Cemetery Offers Tragic Testimony to America’s Most Recent Wars*, NAT’L GEOGRAPHIC (Oct. 21, 2014), <https://news.nationalgeographic.com/news/2014/10/141021-arlington-national-cemetery-iraq-afghanistan-war-ngbooktalk/>.

2. See *Yihjyh Lang Chen*, ARLINGTONCEMETERY.NET, <http://arlingtoncemetery.net/ylchen.htm> (last updated May 15, 2008); *Available Emblems of Belief for Placement on Government Headstones and Markers*, U.S. DEP’T VET. AFFAIRS, NAT’L CEMETERY ADMIN., <https://www.cem.va.gov/hmm/emblems.asp> (last visited Aug. 12, 2018) [hereinafter NCA, *Available Emblems*]; see also Antonia Blumberg, *Arlington Cemetery Gravestones Honor America’s Fallen Soldiers Of Every (And No) Faith*, HUFFINGTON POST (May 24, 2015), <https://bit.ly/2MGAFIs>.

Corps during Operation Iraqi Freedom. He was killed while serving in Iraq. The white stone marking his grave bears the Wheel of Righteousness, indicating his Buddhist faith.<sup>3</sup>

Close by is Grave 8305, the resting place of Ayman Abdelrahman Taha, who served as a Staff Sergeant in the Army Special Forces during Operation Iraqi Freedom. He was killed while serving in Iraq, as he prepared a cache of captured munitions for demolition. He had completed all but his dissertation for a PhD in economics at the University of Massachusetts. The white stone marking his grave bears the Star and Crescent, indicating his Muslim faith.<sup>4</sup>

Eddie Chen, Alan Lam, and Ayman Taha sacrificed themselves for the nation. But because of the combination of their faith and home state, each of them was placed at a remove from the general community by the preamble to his state's constitution.

In the preamble of the Texas constitution, “the people of the State of Texas,” ordain and establish their constitution by invoking the blessings of the Christian God.<sup>5</sup> The preamble of the North Carolina constitution represents “the people of the State of North Carolina” as being grateful to the Christian God.<sup>6</sup> The preamble of the Massachusetts constitution has “the people of Massachusetts” acknowledging with grateful hearts the goodness of the Christian God.<sup>7</sup> By purporting to speak on behalf of all of the people of their respective states and making reference to only the Christian God, these state constitution provisions inferentially place Eddie Chen, Alan Lam, and Ayman Taha—and all their fellow citizens

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3. See Alan D. Lam Burial Detail, ARLINGTON NAT'L CEMETERY EXPLORER, <https://ancexplorer.army.mil/publicwmv/> (select “Find a Grave Site”; then search last name field for “Lam” and search first name field for “Alan”) (last visited Aug. 12, 2018); *Alan Dinh Lam Obituary*, LEGACY (Jan. 28, 2005), <https://bit.ly/2Mf468n>; NCA, *Available Emblems*, *supra* note 2.

4. Ayman A. Taha Burial Detail, ARLINGTON NAT'L CEMETERY EXPLORER, <https://ancexplorer.army.mil/publicwmv/> (select “Find a Grave Site”; then search last name field for “Taha” and search first name field for “Ayman”) (last visited Aug. 12, 2018); Martin Weil, *Serving Was Soldier's Mission*, WASH. POST (Jan. 4, 2006), <https://wapo.st/2qlaBH4>; NCA, *Available Emblems*, *supra* note 2.

5. TEX. CONST. pmb. (“Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.”).

6. N.C. CONST. pmb. (“We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations . . .”).

7. MASS. CONST. pmb. (“We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence . . .”).

who do not adhere to the Christian faith—at a remove and exclude them from equal status as citizens.<sup>8</sup>

The following discussion addresses the propriety of maintaining such religious language. The first section inventories the state constitution preambles for this type of religious language. The second section considers whether the religious language of the preambles assists our understanding of the Establishment Clause. The third section addresses the prudential question of whether, as a matter of public policy and not as a matter of Constitutional requirement, the religious preamble language should be amended. The conclusion returns to Arlington and suggests a conciliatory course of action going forward.

## II. AN INVENTORY OF RELIGIOUS STATE CONSTITUTION PREAMBLES

State constitution preambles with religious language are common. While three states do not have preambles to their constitutions<sup>9</sup> and two states have preambles that do not include religious references,<sup>10</sup> the constitutions of the remaining forty-five states have preambles with religious references that, given the histories of the documents, are clearly to the Christian God. The nomenclature of the Christian God varies. By far the most popular choice is “Almighty God,” which is included in the

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8. The description of those holding religious beliefs disfavored by the government as being forced to “stand at a remove” is from Justice Kagan’s dissent in *Town of Greece v. Galloway*, in which she was joined by Justices Ginsburg, Breyer, and Sotomayor. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1850 (2014) (Kagan, J., dissenting). Justice Kagan posits a situation where a citizen of Muslim faith goes before the Town Board to share her opinions or request some governmental action. Before this Muslim citizen speaks, a minister deputized by the Board is asked to pray “in the name of God’s only son Jesus Christ.” *Id.* The Muslim citizen is faced with the choice: participate in a government-sponsored religious exercise which violates her faith, or dissent by not participating or walking out. *Id.* Justice Kagan nicely describes the situation:

So assume she declines to participate with the others in the first act of the meeting – or even, as the majority proposes, that she stands up and leaves the room altogether. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community’s most cherished beliefs. *And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.*

*Id.* (emphasis added) (citations omitted).

9. See generally N.H. CONST.; VT. CONST.; VA. CONST.

10. See OR. CONST. pmbl.; TENN. CONST. pmbl.

preambles of thirty states.<sup>11</sup> Seven states use the simple “God” in their preambles.<sup>12</sup> Five states use “Supreme Being,”<sup>13</sup> “Supreme Ruler of the

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11. See ALA. CONST. pmbl. (“We the people of the State of Alabama, in order to establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.”); ARIZ. CONST. pmbl. (“We the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution.”); ARK. CONST. pmbl. (“We, the People of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government; for our civil and religious liberty . . . .”); CAL. CONST. pmbl. (“We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.”); FLA. CONST. pmbl. (“We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty . . . .”); GA. CONST. pmbl. (“To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, *relying upon the protection and guidance of Almighty God*, do ordain and establish this Constitution.”) (emphasis added); IDAHO CONST. pmbl. (“We, the people of the state of Idaho, grateful to Almighty God for our freedom . . . .”); ILL. CONST. pmbl. (“We, the people of the State of Illinois – grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors . . . .”); IND. CONST. pmbl. (“To the end, that justice be established, public order maintained, and liberty perpetuated; We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.”); KAN. CONST., pmbl. (“We, the people of Kansas, grateful to Almighty God for our civil and religious privileges . . . .”); KY. CONST., pmbl. (“We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy . . . .”); LA. CONST. pmbl. (“We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy . . . .”); MD. CONST. pmbl. (“We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty. . . .”); MICH. CONST. pmbl. (“We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom . . . .”); MISS. CONST. pmbl. (“We, the people of Mississippi . . . grateful to Almighty god, and invoking his blessing on our work, do ordain and establish this constitution.”); NEB. CONST. pmbl. (“We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights . . . .”); NEV. CONST. pmbl. (“We the people of the State of Nevada Grateful to Almighty God for our freedom . . . .”); N.J. CONST. pmbl. (“We the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to him for a blessing upon our endeavors . . . .”); N.M. CONST. pmbl. (“We, the people of New Mexico, grateful to Almighty God for the blessings of liberty . . . .”); N.Y. CONST. pmbl. (“We, the people of State of New York, grateful to Almighty God for our freedom . . . .”); N.C. CONST. pmbl. (“We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations . . . .”); N.D. CONST. pmbl. (“We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty . . . .”); OHIO CONST. pmbl. (“We, the people of the State of Ohio, grateful to Almighty God for our freedom . . . .”); OKLA. CONST. pmbl. (“Invoking the guidance of Almighty God, in order to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and

Universe,”<sup>14</sup> or “Sovereign Ruler of the Universe” in their preambles.<sup>15</sup> The preambles of two states speak in terms of divine goodness<sup>16</sup> or guidance.<sup>17</sup> Perhaps the most unusual is the Massachusetts preamble,

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happiness, we, the people of the State of Oklahoma, do ordain and establish this Constitution.”); PA. CONST. pmbl. (“We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.”); R.I. CONST. pmbl. (“We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government.”); S.D. CONST. pmbl. (“We, the people of South Dakota, grateful to Almighty God for our civil and religious liberties . . . .”); TEX. CONST. pmbl. (“Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.”); UTAH CONST. pmbl. (“Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this constitution.”); WIS. CONST. pmbl. (“We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution.”).

12. ALASKA. CONST. pmbl. (“We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land . . . .”); CONN. CONST. pmbl. (“The People of Connecticut acknowledging with gratitude, the good providence of God . . . .”); MINN. CONST. pmbl. (“We, the people of the state of Minnesota, grateful to God for our civil and religious liberty . . . .”); MONT. CONST. pmbl. (“We the people of Montana grateful to God for the quiet beauty of our state . . . .”); S.C. CONST. pmbl. (“We, the people of the State of South Carolina, in Convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same.”); W. VA. CONST. pmbl. (“Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of West Virginia, in and through the provisions of this Constitution, reaffirm our faith in and constant reliance upon God . . . .”); WYO. CONST. pmbl. (“We, the people of the State of Wyoming, grateful to God for our civil, political and religious liberties . . . .”).

13. IOWA CONST. pmbl. (“We the people of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings . . . .”).

14. COLO. CONST. pmbl. (“We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government . . . .”); MO. CONST. pmbl. (“We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness . . . .”); WASH. CONST. pmbl. (“We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.”).

15. ME. CONST. pmbl. (“[A]cknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and imploring God’s aid and direction . . . .”).

16. DEL. CONST. pmbl. (“Through Divine goodness, all men have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences . . . .”).

17. HAW. CONST. pmbl. (“We, the people of Hawaii, grateful for Divine Guidance . . . .”).

which refers to the Christian God as “the great Legislator of the universe.”<sup>18</sup> It is notable that the preamble of the Federal Constitution does not contain any reference to the Christian God.<sup>19</sup>

Many state constitution preambles contain references to the Christian God. The effect of such references in Establishment Clause terms is the topic discussed in the next section.

### III. RELIGIOUS PREAMBLES AND THE ESTABLISHMENT CLAUSE

Do the religious preambles comport with the Constitution’s Establishment Clause guarantee that “Congress shall make no law respecting an establishment of religion”?<sup>20</sup> It takes more than a simple inventory to understand the Establishment Clause meaning of state constitution preamble references to the Christian God. A recent academic study of references to God in state constitution preambles was conducted by Professors Peter Smith and Robert Tuttle. They identified a weakness in the argument that the common references to God in the state constitution preambles evidence Establishment Clause toleration of official acknowledgements of God.<sup>21</sup>

The challenge identified by Professors Smith and Tuttle comes from the history of the adoption of preamble references to the Christian God. The authors traced the adoption of such references and found that “references to God in state preambles were not typical in the framing era or in the early nineteenth century and did not become commonplace until at least a half-century after the ratification of the federal Constitution.”<sup>22</sup> They concluded that it was only in the middle of the 19th Century, during the Second Great Awakening,<sup>23</sup> that “references to God started to become the norm.”<sup>24</sup>

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18. MASS. CONST. pmb. (“We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence . . .”).

19. See U.S. CONST. pmb. (“We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”).

20. U.S. CONST. amend. I, cl. 1.

21. See generally Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQ. L. REV. 757 (2017).

22. *Id.* at 767.

23. The Second Great Awakening lasted from the 1790s to the 1840s, and was characterized by a mass participation in evangelical Christian religious activity. One aspect of the movement was a desire to declare the United States a “Christian nation,”



The mid-19th Century origins of the religious preambles present a challenge, because proponents of the permissibility of official acknowledgements of the Christian God typically rely on a history from the time of the framers, stating the following, for example:

In modern debates over the constitutionality of official acknowledgement of God, proponents of the view that such actions are constitutionally permissible regularly advance originalist arguments, relying on history and a long tradition of such actions. Specifically, those sympathetic to this approach have measured constitutionality under the Establishment Clause by seeking to determine whether a particular practice “was accepted by the Framers and has withstood the critical scrutiny of time and political change” and thus is the product of an “unambiguous and unbroken history of more than 200 years.”<sup>25</sup>

Professors Smith and Tuttle found “that there is no unbroken tradition, dating to the framing, of acknowledgments of God in the states’ constitutions.”<sup>26</sup> They concluded that because religious state constitution preambles were a product of the Second Great Awakening, “an approach that views founding-era history as determinative should not treat the preambles as clear evidence of constitutional meaning.”<sup>27</sup>

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and to infuse religious authority into public affairs. See Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 GA. S. U. L. REV. 1305, 1307–1314 (2010).

24. See Smith & Tuttle, *supra* note 21, at 767 (positing that the connection between the Second Great Awakening and the inclusion of references to God in state constitution preambles is compelling evidence, if any was needed, that the preamble references are to the Christian God and not to a Judeo-Christian God or an Abrahamic God, much less some type of generic monotheistic god).

25. *Id.* at 823–24 (quoting *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014), and *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

26. *Id.* at 824.

27. *Id.* In fairness, Smith and Tuttle also suggest that their analysis provides little support for those who would argue the acknowledgements of a Christian God in the state constitution preambles are barred by the Establishment Clause. *Id.* at 758–59 (“The preambles certainly complicate the claim that official acknowledgements of God are incompatible with our legal culture.”). The authors further explain that:

[I]f constitutional meaning can evolve based on changing practices and social values, then there is a plausible case that the Establishment Clause – or at least the Clause as incorporated against the states by the Fourteenth Amendment – tolerates some forms of official acknowledgment of God. To be sure, the character and function of a constitutional preamble – to state the polity’s aspirations and inspirations without creating any operative law – might be sufficiently distinctive to limit the preambles’ relevance for other forms of official endorsement of religious messages. But at a minimum, it would be implausible to argue that a reference to

Smith and Tuttle suggested that recognizing the state constitution preamble religious references as a function of the Second Great Awakening of the mid-19th Century, and not as an act of the framers, also presents a challenge to those who allow for the possibility of evolving constitutional meaning:

[T]hose who accept the possibility of dynamic constitutional meaning must grapple with the significance of the pervasive references to God in the state preambles. After all, if post-ratification cultural and legal changes can become the basis for evolving constitutional meaning, then there is a plausible argument that the preambles represent just such a change in understandings about the appropriate relationship between religion and the political order. On this view, the preambles – and the understandings of the Second Great Awakening – are simply part of our inheritance, which helps to determine constitutional meaning today.<sup>28</sup>

But of course, history did not end with the adoption of the last religious constitutional preamble. If what was appropriate in the mid-19th Century was a function of the change in American religious identity through the Second Great Awakening, then what is appropriate in the early 21st Century may be a function of the contemporary changes in American religious identity.<sup>29</sup> These post-adoption cultural changes are addressed in the following section.

In interpreting the Establishment Clause, Professors Smith and Tuttle concluded that the history of religious preamble references “complicates both originalist claims for the permissibility of official acknowledgements of religion and non-originalist claims opposing them.”<sup>30</sup> They suggested that “this dispute is best resolved by considering the character and function of constitutional preambles,”<sup>31</sup> and set forth a

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God in a state preamble that closely resembles those in other states violates the Establishment Clause today.

*Id.* at 761. But of course, the claim would be that *all* the preamble references to the Christian God violate the Establishment Clause because they fail both the first and second prong of *Lemon*. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .”).

28. Smith & Tuttle, *supra* note 21, at 831.

29. Smith and Tuttle acknowledge the changing religious identity of Americans, although they may be seen as failing to appreciate the pace of change. See *id.* at 832 (“[T]he preambles simply reinforce a widely known, albeit slowly changing, fact about . . . the American polity – that, statistically speaking, it is deeply religious.”).

30. *Id.* at 833.

31. *Id.*

way of reconciling the presence of references to the Christian God in state constitution preambles with a policy of separation of religion and government:

[T]he preambles are consistent with the view that the Establishment Clause contemplates a firmer separation between religion and government. On this view, with which we are sympathetic, the preambles merely reflect the fact that a large percentage of the American people have long maintained a strong religious identity. In addition to a normative commitment to some degree of church-state separation, this approach rests upon a basic understanding of the functions and limitations of constitutional preambles. Preambles are statements of the people's aspirations and inspiration, rather than sources of government's authority. Put more simply, preambles do not have legal effect. This status reflects the important distinction between the voice of a religious people, on the one hand, and the legal authority of a secular government, on the other.<sup>32</sup>

Smith and Tuttle make a convincing case that the pattern of religious references in the preambles of our state constitutions is not particularly helpful, to those on either side of our contemporary debates, in interpreting the Establishment Clause. But this argument does not answer the prudential question of whether, as a matter of public policy and not Constitutional requirement, the religious preamble language should be amended.

#### IV. WHERE DO WE GO FROM HERE?

If one accepts Smith and Tuttle's reasonable conclusion that the religious references in the state constitution preambles are not strong evidence for interpreting the Establishment Clause, the question remains as to whether the provisions should be retained or amended. Thomas Jefferson observed that not every imperfection in our laws and constitutions require correction. "I am certainly not an advocate for frequent and untried changes in laws and constitutions," he wrote, "I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects."<sup>33</sup> Having identified the class of

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32. *Id.* at 831–32.

33. Letter from Thomas Jefferson to H. Tompkinson, a.k.a. Samuel Kercheval (July 12, 1816) (on file with the Library of Congress), [https://www.loc.gov/resource/mj1.049\\_0255\\_0262/](https://www.loc.gov/resource/mj1.049_0255_0262/).

moderate constitutional imperfections as to which we should accommodate, Jefferson spoke of the type of changes which require that constitutional defects be amended, not simply accommodated: “But I know also, that laws and institutions must go hand in hand with the progress of the human mind.”<sup>34</sup> Jefferson further stated, “As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”<sup>35</sup>

Thus, the issue becomes whether the religious references in the state constitution preambles are a moderate imperfection or are something of greater weight.

One could argue from Smith and Tuttle’s analysis that the preambles represent moderate imperfections that might be retained without harm.<sup>36</sup> This might be the case if one accepted the proposition that the preambles simply represent a statement of the aspirations and inspirations of the people, and have no legal effect.<sup>37</sup> Proposals to remove the references to the Christian God from forty-five state constitution preambles would surely generate heated controversy.<sup>38</sup> If the preambles are truly harmless, then those in favor of seeking opportunities for reconciliation across differences of religious belief should be hesitant to suggest amendment.

However, to retain the religious preambles would be a mistake. One reason that the religious preambles should be removed is the deleterious effect that they have on our popular discourse. Recently, for example, a conservative Christian blogger named Donna Calvin read all fifty state

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34. *Id.*

35. *Id.*

36. Smith & Tuttle, *supra* note 21, at 831–832.

37. *Id.* at 832.

38. For example, in 2007 Congressman Dan Burton of Indiana cast a proposal to move the motto “In God We Trust” from the face to the edge of some coins in a larger context: “This country was formed with a firm reliance on God Almighty, and when we start taking God out of everything, as some people want to do, we run the risk of having him turn his back on us.” 153 CONG. REC. H10311 (daily ed. Sept. 7, 2007) (statement of Rep. Burton). The Congressman warned of the consequences of taking the motto off currency:

Those who try to take God off of all things governmental, such as coinage or currency . . . are making a terrible mistake, in my opinion. . . . Once you start turning your back on the good Lord, I think you are going to reap the whirlwind, and this is something this Nation cannot afford to do right now.

*Id.* See also Allan W. Vestal, *Cents & Sensibilities*, 20 U. PA. J. CONST. L. 245, 267 (2017).

constitutions.<sup>39</sup> Ms. Calvin, who bills herself as the “Watchwoman on the Wall,”<sup>40</sup> found “acknowledgements of God” in every state constitution.<sup>41</sup> From this she concluded that the United States is a Christian, not a secular, nation:

I think from reading the Preamble to all the 50 states that . . . saying the US is a secular nation is NOT the way it was before the ACLU and other atheists, anti-God humanists, anti-Christians, anti-religious got the upperhand here. Let’s take our country back for God! Let us be doers of the word!<sup>42</sup>

The preambles ought to be amended because in their present form they can be used, however inaccurately, by those, such as Ms. Calvin, who seek to divide the nation along religious lines.

Nonetheless, the more compelling argument for amendment uses the two points of analysis suggested by Smith and Tuttle. The preambles ought to be amended because they present a fundamentally flawed representation of the aspirations and inspirations of the people of this nation,<sup>43</sup> and because they have been given legal effect with respect to issues that are particularly sensitive.<sup>44</sup>

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39. Donna Calvin, *Inspirational – Preamble for your State constitution (plus video)*, WATCHWOMAN ON THE WALL, <http://www.beliefnet.com/columnists/watchwomanonthewall/2011/07/inspirational-preamble-for-your-state-constitution-plus-video.html> (last visited Aug. 11, 2018) [hereinafter Calvin, *Preamble*]. To be precise, Calvin read forty-five preambles that have religious references. For the three states that do not have preambles, Calvin posted other provisions. For New Hampshire, she quoted N.H. CONST. pt. 1, art. V. For Vermont, she quoted VT. CONST. pmbl. (1777), although the current Vermont constitution was adopted in 1793 and does not have a preamble. For Virginia, she quoted VA. CONST. art. 1, § 16. For the two states that have non-religious preambles, Calvin posted other provisions. For Oregon, she quoted OR. CONST. art. 1, § 2. For Tennessee, she quoted TENN. CONST. art. 1, § 3. *Id.*

40. Donna Calvin, *Who is the Watchwoman on the Wall?*, WATCHWOMAN ON THE WALL, <http://www.beliefnet.com/columnists/watchwomanonthewall/who-is-the-watchwoman-on-the-wall.html/> (last visited Aug. 11, 2018) [hereinafter Calvin, *Watchwoman*]. Ms. Calvin also identifies herself as a “Word Warriorette.” *See id.*

41. Calvin, *Preamble*, *supra* note 39 (“After reviewing acknowledgments of God from all 50 state constitutions, one is faced with the prospect that *maybe, the ACLU and the out-of-control federal courts are wrong!*”). The blog notes that “Donna Calvin is a frequent co-host of ‘What’s Right, What’s Left.’ The pro-life, conservative, non-compromising, King James only, Christian program . . . .” *Id.* Perhaps anticipating criticism of her reading of the preambles, Calvin implored the reader: “Please note that at no time is anyone told that they MUST worship God.” *Id.*

42. *Id.* (citation omitted).

43. *See infra* Section III.A.

44. *See infra* Section III.B.

A. *The Voice of the People*

The religious preambles ought to be amended because they present a fundamentally flawed representation of the people of this nation. As Smith and Tuttle conceive it, the preambles are expressions of the nation's inspirations and aspirations: "As the voice of the people, rather than an exercise of governmental authority, a preamble is a statement of inspiration and aspiration."<sup>45</sup> But the state constitution preambles are not simply "the voice of the people."<sup>46</sup> As the authors acknowledge at another point in their article, the preambles reflect "the voice of a religious people."<sup>47</sup> As is clear from the content, "the preambles merely reflect the fact that a large percentage of the American people have long maintained a strong religious identity."<sup>48</sup>

The United States has a history of widespread religious identity, but the Establishment Clause protections for Americans disfavored because of their religious beliefs ought not depend on the relative sizes of the favored and disfavored groups. The historical religiosity of the population may explain why the religious preamble references were desired, and how they were adopted over the objections of those with differing beliefs.<sup>49</sup> Yet the history of widespread belief does not justify the inclusion of references to the Christian God in state constitution preambles.

Constitutional preambles could, and indeed should, channel the voice of the people.<sup>50</sup> But that laudable purpose is thwarted when the preamble is cast in religious terms that exclude some citizens. The presence of such exclusionary language is the difference between being "the voice of the people,"<sup>51</sup> and being merely "the voice of a religious people."<sup>52</sup>

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45. Smith & Tuttle, *supra* note 21, at 833.

46. *Id.*

47. *Id.* at 831–32.

48. *Id.*

49. As Smith and Tuttle chronicle, the inclusion of the preamble references to the Christian God did generate some controversy. *Id.* at 798–802 (referencing Wisconsin, Maryland, California, and Indiana).

50. *Id.* at 832.

51. *Id.* at 833.

52. *Id.* at 832. As Smith and Tuttle explain:

Preambles are statements of the people's aspiration and inspiration, rather than sources of government's authority. Put more simply, preambles do not have legal effect. This status reflects the important distinction between the voice of a religious people, on the one hand, and the legal authority of a secular government, on the other.

Here, the question is not whether the preamble references to the Christian God are permissible under the Establishment Clause, but rather whether such provisions are appropriate in a society, such as ours, that is increasingly religiously diverse. This issue calls for a prudential determination as to whether the invocation of the Christian God is more helpful than harmful to the nation. This is a question of who we have become, and what we wish to be.

The religious identity of Americans has changed dramatically from the time when the preamble references to the Christian God were adopted. A recent study identifies two evolutionary developments relevant to our discussion: the increasing portion of Americans identifying with non-Christian religious beliefs, and the increasing portion of Americans with no religious affiliation.<sup>53</sup> Together, these groups constitute almost one-third of the nation.<sup>54</sup>

The first development relates to those with non-Christian religious affiliations. According to Daniel Cox and Robert Jones, authors of the aforementioned study on American religious identity, “Non-Christian religious groups constitute less than one in ten Americans. Muslims, Buddhists, and Hindus are each roughly one percent of the population. Jewish Americans account for two percent of the public.”<sup>55</sup> The authors also note the generational shift in non-Christian religious identity. Statistics regarding the national prevalence of affiliation with non-Christian faiths, organized by age cohort, show a pattern: 6% among those aged 18–29 are affiliated with a non-Christian faith, as compared to 5% among those 30–49, and 4% among those 50 and older.<sup>56</sup>

The second development relates to those who have no religious affiliation. Cox and Jones found that those who are “religiously unaffiliated”—who identify as atheist, agnostic, or nothing in

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*Id.*

53. Daniel Cox & Robert P. Jones, *America’s Changing Religious Identity*, PUB. RELIGION RESEARCH INST. 7, 10–11 (Sept. 6, 2017), <https://www.prii.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf>.

54. *See id.* at 10. The authors report that of the 97% of Americans who responded as non-Christians, 24% identified as unaffiliated, while 2% identified as Jewish, Muslim (1%), Buddhist (1%), Hindu (1%), or another non-Christian religion (1%). *Id.* at 10–11.

55. *Id.* at 11.

56. *Id.* These statistics include the following non-Christian religious categories: “Jewish,” “Other religion,” and “Other world religions.” *Id.* Moreover, the authors state that “America’s youngest religious groups are all non-Christian”; over one-third of Muslims, Buddhists, and Hindus in the United States are under the age of 30. *Id.* at 7.

particular—now account for 24% of all Americans.<sup>57</sup> As they put the figure in context, “[n]o religious group is larger than those who are unaffiliated from religion.”<sup>58</sup> The authors also comment as to the growing importance of the religiously unaffiliated, observing that “[s]ince the early 1990s, this group has roughly tripled in size.”<sup>59</sup> Moreover, the percentage of those who are religiously unaffiliated “is highly stratified by age,” with 38% of those in the 18 to 29 year-old cohort so identified, ranging down to only 8% of those in the cohort aged 80 and above.<sup>60</sup>

The effect of these two developments is also notable when one looks at the American religious landscape using both religious identity and race. Cox and Jones noted the decline of white Christians to minority status.<sup>61</sup> The authors also note the pattern is even more pronounced when one factors in age. As Cox and Jones observed, the decline of Christian affiliation is pronounced in younger cohorts.<sup>62</sup>

Against this backdrop of increasing religious diversity, the preamble references to the Christian God are inappropriate for one of two reasons. Take for example the Michigan constitution, the preamble of which declares: “We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom . . . .”<sup>63</sup> One possibility is that the

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57. *Id.* at 24. Within this religiously unaffiliated group there are some distinctions. Within the 24% of the overall population who identify as religiously unaffiliated, 14% (3.4% of the total) identify as atheists, 13% (3.1% of the total) identify as agnostics, 58% (13.9% of the total) identify as secular persons, and 16% (3.8% of the total) identify as “religious” persons (despite their lack of affiliation with any particular faith). *Id.* at 26.

58. *Id.* at 11.

59. *Id.* at 24.

60. *Id.* at 24–25.

61. *Id.* at 10 (noting that 17% of the population identify as white evangelical Protestants, 13% as white mainline Protestants, and 11% as white Catholics). As to non-white participation, the authors report: Fifteen percent of Americans are nonwhite Protestants, including black Protestants (8%), Hispanic Protestants (4%), and Asian, mixed-race, and other race Protestants (3%). Seven percent of the public is Hispanic Catholic *Id.* at 11.

62. The report stated:

The religious landscape in the U.S. is highly stratified by generation. Nearly two-thirds of seniors (age 65 or older) identify as white and Christian: White evangelical Protestant (26%), white mainline Protestant (19%), or white Catholic (16%). Conversely, only about one-quarter of young adults (age 18–29) belong to a white Christian tradition, including white evangelical Protestants (8%), white mainline Protestant (8%), or white Catholic (6%). Young adults are more than three times as likely as seniors to identify as religiously unaffiliated (38% vs. 12%, respectively).

*Id.* at 11.

63. MICH. CONST. pmb1.



Michigan preamble inappropriately excludes non-Christians from the group considered “the people of the State of Michigan.” The only other possibility is that the Michigan preamble inaccurately ascribes to non-Christian Michiganders gratitude to the Christian God in whom they do not believe for their freedom.<sup>64</sup>

The evolution of the nation on matters of religious belief has made the preamble references to the Christian God increasingly inappropriate. Additionally, in many states, the evolution on matters of religious belief has also brought the preambles into greater conflict with other provisions of the state constitution. Thirty-one states have constitutional provisions that guarantee that the state will not prefer one faith over another.<sup>65</sup> For example, as the Wisconsin provision states: “[N]or shall . . . any preference be given by law to any religious establishments or modes of worship . . . .”<sup>66</sup> Preamble references to the Christian God are inconsistent with these anti-preference provisions. Notably, of the forty-five states that have religious preambles, twenty-eight also have an anti-preference clause.<sup>67</sup>

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64. The situation is particularly ironic for Michigan, which has a significant non-Christian population. About 2.75% of Michiganders are Muslims, contrasted with the national figure of 1%. Michael Jackman, *Everyone in Michigan should read this new report on the state's Muslims*, DETROIT METRO TIMES (Sept. 14, 2017), <https://www.metrotimes.com/news-hits/archives/2017/09/14/everyone-in-michigan-should-read-this-new-report-on-the-states-muslims>. Michigan Muslims represent 15% of the state's doctors, 10% of its pharmacists, and 7% of its dentists. *Id.* The group accounts for 4.18% of the state's small business owners. *Id.* Hamtramck, Michigan, a community of 22,000 residents, in 2013 became the first majority-Muslim city in the nation. Sarah Pulliam Bailey, *In the first majority-Muslim U.S. city, residents tense about its future*, WASH. POST (Nov. 21, 2015) <https://tinyurl.com/y8pm8h83>. From 1970, Hamtramck's Polish Catholic population decreased from 90% to 11%. *Id.*

65. Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL'Y 443, 502–504 (2016).

66. WIS. CONST. art. I, § 18.

67. See ALA. CONST. art. I, § 3; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; KAN. CONST. Bill of Rights, § 7; KY. CONST. Bill of Rights, § 5; ME. CONST. art. I, § 3; MASS. CONST. Articles of Amendment, art. XI; MINN. CONST. art. I, § 16; MISS. CONST. art. I, § 18; MO. CONST. art. I, § 7; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; PA. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TEX. CONST. art. I, § 6; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18; see also *supra* notes 11–18 (citing all 45 religious state constitution preambles).

### B. *Without Legal Effect*

The religious preambles also should be amended because they have been given legal effect, and have been cited in cases involving sensitive social issues.<sup>68</sup> Smith and Tuttle suggest that “preambles do not have legal effect,”<sup>69</sup> and this position is supported as to both the Federal Constitution<sup>70</sup> and some state constitutions.<sup>71</sup> However, there are also cases in which state constitution preamble references to the Christian God have been claimed to have legal effect, sometimes with at least temporary success.<sup>72</sup> Notably, these cases have involved important Establishment Clause issues.<sup>73</sup>

#### 1. Ten Commandments Monuments

Shortly after being elected Chief Justice of the Alabama Supreme Court in November of 2000, Roy Moore designed and commissioned a granite monument for the rotunda of the Alabama Judicial Building. The monument was replete with Christian religious symbolism:

The monument is in the shape of a cube, approximately three feet wide by three feet deep by four feet tall. The top of the monument is carved as two tablets with rounded tops, the common depiction of the Ten Commandments; these tablets slope toward a person viewing the

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68. *See infra* Sections III.B.1–5. These cases, involving questions of forced religious instruction in schools, the censorship of films, and the endorsement of some religions by the government, raise fundamental issues of religious liberty and freedom of expression.

69. Smith & Tuttle, *supra* note 21, at 832.

70. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

71. *See, e.g., Omaha Nat’l Bank v. Spire*, 389 N.W.2d 269, 274 (Neb. 1986) (“[T]he Preamble is not a part of the Constitution, but only a general statement of purpose. . . . [T]he State of Nebraska does not derive any of its substantive powers from the Preamble to the Nebraska Constitution. The Preamble cannot exert any power to secure the declared objects of the Constitution unless, apart from the Preamble, such power can be found in, or can be properly implied from, some express delegation in the Constitution.”).

72. Not all the attempts have been serious. One of the least successful was an appeal of a Pennsylvania murder conviction. *Commonwealth ex rel. Brown v. Rundle*, 227 A.2d 895, 896 (Pa. 1966). Eleven years after his conviction, Brown appealed, claiming “that his conviction and sentence for second degree murder is void because he was ‘. . . proceeded against, prosecuted and sentenced by a religious establishment . . . .’” *Id.* at 896. He also argued “that the Preamble of the Pennsylvania Constitution . . . violate[s] the Federal Constitution.” *Id.* The Pennsylvania Supreme Court rejected the claims with emphasis: “Brown’s contentions are not only devoid of any legal merit, they are ridiculous.” *Id.*

73. *See infra* Sections III.B.1–5.

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monument from the front. The tablets are engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible. Due to the slope of the monument's top and the religious appearance of the tablets the tablets call to mind an open Bible resting on a lectern.<sup>74</sup>

In addition to the Ten Commandments, the federal district court noted that “the four sides of the monument are engraved with fourteen quotations from various secular sources.”<sup>75</sup> While the *sources* might have been secular, the *quotations* themselves were not:

The north (front) side of the monument has a large quotation from the Declaration of Independence, “Laws of nature and of nature’s God,” and smaller quotations from George Mason, James Madison, and William Blackstone that speak of the relationship between nature’s laws and God’s laws. The large quotation on the west (right) side of the monument is the National Motto, “In God We Trust”; the smaller quotations on that side were excerpted from the Preamble to the Alabama Constitution and the fourth verse of the National Anthem. The south (back) side of the monument bears a large quotation from the Judiciary Act of 1789, “So help me God,” and smaller quotations from George Washington and John Jay speaking of oaths and justice. The east (left) side of the monument has a large quotation from the Pledge of Allegiance 1954, “One nation under God, indivisible, with liberty and justice for all,” and smaller quotations from the legislative history of the Pledge, James Wilson, and Thomas Jefferson suggesting that both liberty and morality are based on God’s authority.<sup>76</sup>

At the unveiling of the monument, Chief Justice Moore justified his actions by referencing the acknowledgement of the Christian God in the preamble of the Alabama constitution:

Chief Justice Moore made a speech noting that the monument depicted the “moral foundation of law.” . . . He explained that the monument “serves to remind the Appellate Courts and judges of the Circuit and District Court of this State and members of the bar who appear before them, as well as the people of Alabama who visit the Alabama Judicial Building, of the truth stated in the Preamble to the Alabama

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74. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1294–95 (M.D. Ala. 2002) (emphasis omitted).

75. *Id.* at 1295.

76. *Id.*

Constitution that in order to establish justice we must invoke ‘the favor and guidance of almighty God.’<sup>77</sup>

The federal district court was “impressed that the monument and its immediate surroundings are, in essence, a consecrated place, a religious sanctuary, within the walls of a courthouse.”<sup>78</sup> The court concluded that the placement of the monument in the rotunda of the Alabama Judicial Building violated the Establishment Clause.<sup>79</sup> Chief Justice Moore’s refusal to move the monument as ordered by the federal court led to an order for his removal from office by the Alabama Court of the Judiciary.<sup>80</sup>

In defending himself against removal before the Alabama Supreme Court, Chief Justice Moore returned to the state preamble. His argument was based on the Tenth Amendment, as he stated:

*The Preamble to the Alabama Constitution of 1901* provides: “We, the people of Alabama, in order to establish justice, . . . invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution . . . .” Chief Justice Moore says that he installed the monument, consistent with this “constitutionally divine acknowledgement,” to recognize the God mentioned in the *Preamble to the Alabama Constitution*. He also says that power has not been delegated to the United States to deny the State of Alabama the right to do so. Chief Justice Moore argues that state[s] have the inherent power to establish a system of justice, and that Alabama established its system of justice “invoking the favor and guidance of Almighty God.” Thus, according to Chief Justice Moore, the order of the federal district court directly and unlawfully interferes with a power expressly reserved to the State of Alabama.<sup>81</sup>

Chief Justice Moore did not prevail in his argument, and was removed from office.<sup>82</sup>

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77. *Id.* at 1295–96.

78. *Id.* at 1295.

79. *See id.* at 1319.

80. *See Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848, 852–54 (Ala. 2004).

81. *Id.* at 856–57 (citations omitted).

82. *See id.* at 861–62. In this episode, Moore was *removed* from the office of Chief Justice of the Alabama Supreme Court. In another episode, in 2016, Moore was permanently *suspended* from the office of Chief Justice of the Alabama Supreme Court for the remainder of his term for violating judicial ethics in his defiance of federal court rulings on marriage equality. *See Arian Campo-Flores, Alabama Chief Justice Roy Moore Suspended for Rest of his Term Over Defiance on Gay Marriage*, WALL STREET J.

Five years prior to *Moore v. Judicial Inquiry Comm'n*, a county government in Indiana raised that state's constitutional preamble reference to the Christian God in litigation involving the placement of another Ten Commandments monument on its courthouse lawn.<sup>83</sup> The monument included the Bill of Rights and a quotation from the preamble to the Indiana constitution: "To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution."<sup>84</sup>

The representative of the county testified that he believed "that the Ten Commandments, the Bill of Rights, and the State Constitution's Preamble all represent values, specifically with regard to the Ten Commandments, the values reflected are those of not killing, stealing, or lying."<sup>85</sup> He also testified as to "other important values" represented by the Ten Commandments: "I know that I can't worship stone"; "You shouldn't use God's name in vain"; and "Everyone needs a day of rest, specifically the Sabbath."<sup>86</sup> The county representative also testified that the monument was designed to honor a local industry: "Commissioner Terry testified that the Monument is on the Courthouse lawn to honor the importance of the limestone industry in the County, but acknowledged that this reason does not explain why the documents on the monument were chosen to be depicted."<sup>87</sup> Use of the preamble and the Bill of Rights was insufficient to escape a finding that the monument failed scrutiny under the Establishment Clause.<sup>88</sup>

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(September 30, 2016), <https://www.wsj.com/articles/alabama-chief-justice-ray-moore-suspended-for-rest-of-his-term-overdefiance-on-gay-marriage-1475259439>.

83. *Kimbley v. Lawrence Cty.*, 119 F. Supp. 2d 856, 858 (S.D. Ind. 2000).

84. *Id.* at 862.

85. *Id.* at 863.

86. *Id.*

87. *Id.* at 864. Lawrence County's website notes that the county is called "Limestone Country" and speaks of that heritage:

Lawrence County's rich limestone quarrying and carving history began in the early 1800s. Since then, the county has been known as "Limestone Country." Many of America's famous buildings were built of stone quarried from Limestone Country, including the Empire State Building, Chicago's Tribune Tower, the Pentagon and the new Yankee Stadium.

*Limestone Country*, LAWRENCE CTY., <http://www.limestonecountry.com/index.php/limestone/> (last visited Aug. 11, 2018).

88. *Kimbley*, 119 F. Supp. 2d at 875.

## 2. Film Censorship

In a 1951 New York case, *Joseph Burstyn, Inc. v. Wilson*,<sup>89</sup> that state's religious constitutional preamble was used to help justify the censorship of a film for being sacrilegious.<sup>90</sup> The film was *Il Miracolo* ("The Miracle"), a segment of Italian filmmaker Roberto Rossellini's 1948 anthology film, *L'Amore* ("The Love").<sup>91</sup> The film won critical acclaim; it received the New York Film Critics Circle award for best foreign language film in 1950.<sup>92</sup> The film was also condemned by the Catholic Legion of Decency.<sup>93</sup>

*Il Miracolo* was deemed sacrilegious by the State of New York, whereupon the film's exhibition license was revoked.<sup>94</sup> In making its determination of sacrilege, the state looked to the content of the film and found it objectionable.<sup>95</sup> The appellate court upheld the censorship of *Il*

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89. *Joseph Burstyn, Inc. v. Wilson*, 101 N.E.2d 665 (N.Y. 1951), *rev'd*, 343 U.S. 495 (1952).

90. *See id.* at 673.

91. L'AMORE (Finecinema 1948). *Il Miracolo* was later removed from *L'Amore* and repackaged in a three-part anthology film, *The Ways of Love*, for international distribution. THE WAYS OF LOVE (John Burstyn, Inc. 1950). The *Burstyn* case dealt with the rescission of New York state licenses for public exhibition of *The Ways of Love*. *See Burstyn*, 101 N.E.2d at 666–67.

92. *See id.* at 676 (Fuld, J., dissenting).

93. *See* Stephanie Yeagle, *Pacatte to host program on films condemned by Catholic Legion of Decency*, Nat'l Catholic Reporter (Feb. 24, 2016), <https://bit.ly/2nwjzIE>. In addition to *Il Miracolo*, in 1951 the Catholic Legion of Decency also condemned a remake of Fritz Lang's classic film, *M*. *See* Beth Accomando, *C Is For 'Condemned': A Nun Looks Back On 47 Years Of Unholy Filmmaking*, NPR MOVIES (Mar. 3, 2016, 5:01 PM), <https://n.pr/2MEgtXZ>.

94. *Burstyn*, 101 N.E.2d at 667.

95. *Id.* at 671. The court's rationale for condemning *Il Miracolo* is set out in vivid detail:

While the film in question is called "The Miracle", no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as "Saint Joseph". At the very beginning of the script, reference is made to "Jesus, Joseph, Mary". "Saint Joseph" first causes her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matthew 1:20) [sic], are freely employed immediately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. "Saint Joseph" abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is "crowned" with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as "my blessed son", "My holy son".

*Miracolo* based on the content of the film, stating that:

Christ is the heart and core of the Christian faith. Two personalities most closely related to Him in life were His mother, Mary, and Joseph. They are deeply revered by all Christians. . . . “The Miracle” not only encroaches upon this sacred relationship and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associating it, as the Regents found, “with drunkenness, seduction, mockery and lewdness”, and, in the language of the script itself, with “passionate attachment \* \* \* sexual passion” and “gratification”, as a way of love.<sup>96</sup>

As to the standard being employed, the court was clear. The court stated “that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures.”<sup>97</sup> As the court explained, the censorship of the film “is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle.”<sup>98</sup>

The New York court justified the censorship in part using the religious preamble of its constitution:

The preamble to our State Constitution expresses our gratitude as a people to Almighty God for our freedom. To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to “the free exercise” of religion, guaranteed by the First Amendment.<sup>99</sup>

It is now understood that the state censorship of sacrilegious films approved in *Burstyn*, in part on the authority of the religious preamble to the New York constitution, violates the Establishment Clause. This is because on appeal of *Burstyn*, the Supreme Court struck down the practice.<sup>100</sup> The Supreme Court in *Burstyn* found “that expression by

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*Id.*

96. *Id.*

97. *Id.* at 672.

98. *Id.* at 672–73.

99. *Id.* at 673.

100. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments,”<sup>101</sup> and found that the New York sacrilegious standard was impermissible as both a matter of religious freedom<sup>102</sup> and freedom of expression.<sup>103</sup>

### 3. Public School Religious Instruction

In a 1947 Illinois case, *People ex rel. McCollum v. Board of Education*,<sup>104</sup> Illinois’ religious constitutional preamble was used to help justify a public school program for religious instruction.<sup>105</sup> *McCollum* involved a religious education program in the Champaign School District, under the auspices of “the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic and Protestant faiths.”<sup>106</sup> With the permission of their parents, students were excused from classes and allowed to attend classes in religious

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101. *Id.* at 502.

102. *Id.* at 504–05. As the Court explained:

This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of “sacrilegious” given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies, New York cannot vest such unlimited restraining control over motion pictures in a censor. Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the “sacrilegious” test, in these or other respects, might raise substantial questions under the First Amendment’s guaranty of separate church and state with freedom of worship for all.

*Id.* (citations omitted).

103. *Id.* at 505. The Court further explained:

[F]rom the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

104. *People ex rel. McCollum v. Bd. of Educ.*, 71 N.E.2d 161 (Ill. 1947), *rev’d*, 333 U.S. 203 (1948).

105. *See id.* at 168.

106. *Id.* at 162.



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instruction within their school building.<sup>107</sup> Classes were offered by faith tradition, with additional groups allowed to participate if they wished: “Each faith—Catholic, Jewish and Protestant, was to have its separate instructional classes and no expense in connection with the classes was to be borne by the board. Additional groups were to be freely permitted to participate upon the same terms.”<sup>108</sup> Notwithstanding the segregation by religion, the materials were alleged to be nonsectarian:

Lesson materials and curriculum were to be selected by a committee representative of all groups participating and in a manner to avoid any offensive, doctrinal, dogmatic or sectarian teaching. It is apparent the teaching was to be of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church.<sup>109</sup>

The Illinois Supreme Court approved the practice, finding the plan consistent with both the Illinois and national constitutions.<sup>110</sup> However, the Court cast its evaluation in terms of free exercise, not establishment, stating:

Certainly, such classes do not violate the freedom of conscience of any individual or group so long as the classes are conducted upon a purely voluntary basis. Freedom of religion as intended by those who wrote the State and Federal constitutions means the right of an individual to entertain any desired religious belief without interference from the State.<sup>111</sup>

In doing so, the Court cited the religious preamble of the Illinois constitution to justify the government’s involvement in religious education:

Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. We find such recognition in the very preamble of our State constitution. The government does not recognize a particular faith but this does not mean that it is indifferent to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the constitution itself.<sup>112</sup>

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107. *Id.* at 163.

108. *Id.* at 162.

109. *Id.*

110. *Id.* at 168.

111. *Id.*

112. *Id.*

Later, in 1947, the California Court of Appeals decided *Gordon v. Board of Education*,<sup>113</sup> a case involving that state's public school release program for religious instruction.<sup>114</sup> As in *McCollow* with the Illinois preamble, California's religious constitution preamble was used to help justify the program.<sup>115</sup> The California program allowed students to "be excused from schools to participate in religious exercises or to receive moral and religious instruction."<sup>116</sup> The program was coordinated by an Interfaith Committee, which included "Catholics, those of the various Protestant faiths, and Jews."<sup>117</sup> Students were released from school and transported to off-school locations for religious instruction. The court described the program: "[C]hildren are segregated according to the preferences expressed by their parents regarding religious instruction, transported from the school grounds to places arranged for by the Interfaith Committee, and there taught the doctrine of the church to which they have been assigned."<sup>118</sup> Students whose parents did not elect to have them participate remained at the school, without any assurance that they would receive any educational instruction, while their participating classmates were absent from the classroom for religious instruction.<sup>119</sup>

The majority opinion upholding the program made recourse to California's religious preamble by quoting the Illinois Supreme Court opinion in *McCollow* as to the Illinois religious preamble.<sup>120</sup> Justice White's use of California's religious preamble in his concurrence was even more forceful.<sup>121</sup> White set forth a rather apocalyptic view of what was at stake in *Gordon*:

History, both ancient and modern, bears striking witness to the inevitable fate that has befallen peoples whose government has engaged in undermining or destroying belief in the existence of God and attempted to replace Him with idols, either in the form of a man, groups of men, or of the state. Inalienable, natural rights of every kind disappeared and the individual became but the pawn and chattel of the

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113. *Gordon v. Bd. of Educ.*, 178 P.2d 488 (Cal. Dist. Ct. App. 1947).

114. *Id.* at 489.

115. *Id.* at 495.

116. *Id.* at 489.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 492–93 (quoting *People ex rel. McCollow v. Bd. of Educ.*, 17 N.E.2d 161, 166 (Ill. 1947)).

121. *Id.* at 495 (White, J., concurring).

state, stripped of any rights, privileges or guaranties except such as might be conferred upon him by the state—a veritable system of ignominious slavery.<sup>122</sup>

Having reduced the issue to freedom and slavery, White rather egregiously mischaracterized the appellant's argument when he stated that "Appellant's argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument."<sup>123</sup> To further support his assertion of the "true concept of the American philosophy of government,"<sup>124</sup> White cited the religious preambles and other sections of the various state constitutions:

In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community. The preamble of the Constitution of the State of California says: "We, the People of the State of California, *grateful to Almighty God* for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."<sup>125</sup>

It is now understood that the use of public school resources to facilitate sectarian religious education violates the Establishment Clause. This is because on appeal of *McCullum*, the Supreme Court struck down the Illinois public school religious instruction program<sup>126</sup>:

This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*.<sup>127</sup>

The Supreme Court quoted *Everson* as to the overall requirements

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122. *Id.* at 496–97.

123. *Id.* at 495.

124. *Id.*

125. *Id.* at 495–96.

126. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

127. *Id.* at 210.

of the Establishment Clause:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”<sup>128</sup>

The court also rejected Illinois’ argument “that[,] historically[,] the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions.”<sup>129</sup> The Court concluded:

Here not only are the State’s tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State’s compulsory public school machinery. This is not separation of Church and State.<sup>130</sup>

#### 4. Public School Bible Readings and Prayers

In a 1950 New Jersey case, *Doremus v. Board of Education*,<sup>131</sup> that state’s religious constitutional preamble was used to help justify the recitation of the Lord’s Prayer and Bible readings in public schools.<sup>132</sup> *Doremus* considered a New Jersey statute that required teachers in public schools to recite daily Biblical passages in their classrooms to the

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128. *Id.* at 210–11 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947)).

129. *Id.* at 211.

130. *Id.* at 212.

131. *Doremus v. Bd. of Educ.*, 71 A.2d 732 (N.J. Super. Ct. Law Div. 1950).

132. *Id.* at 738–39.

assembled students:

At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled.<sup>133</sup>

The New Jersey statute limited religious readings in school to Biblical readings and recitation of the Lord's Prayer.<sup>134</sup>

Recognizing that sectarian education was not permissible under the Establishment Clause, the *Doremus* court attempted to establish the remarkable proposition that the Bible is not a sectarian book:

That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a "sectarian book." The book itself, to be sectarian, must show that it teaches the particular dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. . . . The King James translation of the Bible, or any edition of the Bible, is not a sectarian book and the reading thereof without comment in the public schools does not constitute sectarian instruction.<sup>135</sup>

Having proven the Bible not a sectarian book, the *Doremus* court took the final step and proved that Biblical readings did not constitute sectarian instruction. The court reasoned that "[i]f the Bible, particularly the Old Testament, is not a sectarian book, it necessarily follows that a mere reading therefrom, without comment, cannot be called sectarian instruction and as such, is not in violation of the First or Fourteenth

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133. *Id.* at 733 (quoting N.J. REV. STAT. § 18:14-77 (1937) (repealed 1967)).

134. *Id.* (quoting N.J. REV. STAT. § 18:14-78 (1937) (repealed 1967)) ("Religious services or exercises. No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools.").

135. *Id.* at 740 (quoting Illinois *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 256 (1948) (Jackson, J., concurring)). This position, that different versions of the Bible are not sectarian, conflicts with the positions of some Biblical adherents. For example, conservative Christian blogger and talk radio host Donna Calvin, with whom this discussion began, has declared: "I truly believe that the King James Bible and the Geneva Bible contain the truth and that the rest of the versions of the Bible are false and pervert the Word of God." Calvin, *Watchwoman*, *supra* note 40.

Amendments, *even to those persons known as atheists.*<sup>136</sup> Imagine the surprise of students and parents of the Jewish faith to learn that the New Testament is not a sectarian text, and the surprise of atheists to learn that the Bible was not sectarian.

From establishing that the Bible is not a sectarian book, the *Doremus* court easily decided the ultimate matter at issue:

My conclusion is that a repetition of the Lord's Prayer as a morning exercise, without comment or remark, for the purpose of quieting pupils and preparing them for their daily studies, and a reading from the Old Testament of the Holy Bible, without comment, as the book best adapted from which to teach children and youth the principles of piety, justice, and a sacred regard for truth, love for their country, humanity and a universal benevolence, are certainly not designed to inculcate any particular dogma, creed, belief or mode of worship, and accordingly, the provisions of the New Jersey statutes under review do not contravene the First and Fourteenth Amendments of the United States Constitution.<sup>137</sup>

To support this remarkable conclusion the *Doremus* court cited the religious preamble of the New Jersey constitution.<sup>138</sup>

The fact that the practice of reading Bible verses in public school, approved in *Doremus* in part on the authority of the religious preamble to the New Jersey constitution, violates the Establishment Clause is now clear.<sup>139</sup> The facts of *School District of Abington Township v. Schempp*,<sup>140</sup> which decided the matter the following decade, replicated those of *Doremus*, as Pennsylvania required the reading of Bible verses every day at the start of the school day.<sup>141</sup>

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136. *Doremus*, 71 A.2d at 740 (emphasis added).

137. *Id.*

138. *Id.* at 738 (quoting preamble from the New Jersey Constitution of 1947, taken verbatim from the earlier Constitution of 1844: "We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution").

139. See *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

140. *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

141. The Pennsylvania statute before the court in *Schempp* required: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." *Schempp*, 374 U.S. at 205 (quoting 24 PA. STAT. § 15-1516 (Supp. 1960)). The Lord's Prayer was also read every day. *Id.* at 207. The companion case to *Schempp* considered a

The Supreme Court adopted the trial court's finding that the recitation of Bible verses and the Lord's Prayer in public schools was a religious ceremony.<sup>142</sup> "Given that finding," the Court announced, "the exercises and the law requiring them are in violation of the Establishment Clause."<sup>143</sup> As to the companion case, the Court discussed the religious nature of the practice:

Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.<sup>144</sup>

The Court concluded that "the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners."<sup>145</sup> Because the analysis was under the Establishment Clause, it made no difference that individual students could opt out of participation.<sup>146</sup> Nor was it a defense that the prayers constituted relatively minor violations of the Establishment Clause.<sup>147</sup>

In a 1961 New York case, *Engel v. Vitale*,<sup>148</sup> New York's religious constitutional preamble was used to help justify the classroom recitation of an act of reverence to God.<sup>149</sup> The New York state governing body for public education recommended, and the Nassau County public school

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Maryland statute that also required the reading without comment of Bible verses and the Lord's Prayer. *See id.* at 211.

142. *Id.* at 223.

143. *Id.*

144. *Id.* at 224.

145. *Id.*

146. *Id.* at 224–25 ("Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.") (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

147. *Id.* at 225 ("Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'") (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 65 (1947)).

148. *Engel v. Vitale*, 176 N.E.2d 579 (N.Y. 1961), *rev'd*, 370 U.S. 421 (1962).

149. *Id.* at 582–83 (Froessel, J., concurring).

board adopted, a required classroom “act of reverence”<sup>150</sup> to God:

[A]t the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”<sup>151</sup>

The *Engel* court identified the issue as whether the recitation of the act of reverence to God was religious education or an establishment of religion: “If the utterance of these reverential words was ‘religious education,’ then providing such education would be so far beyond the powers of a public school board as to be wholly arbitrary and unlawful, so that the courts would need no constitutional warrant for forbidding it.”<sup>152</sup>

But, the *Engel* court concluded that the “act of reverence to God” was not an establishment because it did not constitute the adoption of a sectarian belief:

But it is not “religious education” nor is it the practice of or establishment of religion in any reasonable meaning of those phrases. Saying this simple prayer may be, according to the broadest possible dictionary definition, an act of “religion,” but when the Founding Fathers prohibited an “establishment of religion” they were referring to official adoption of, or favor to, one or more sects. They could not have meant to prohibit mere professions of belief in God . . . [and] a holding that it is such a violation would be in defiance of all American history, and such a holding would destroy a part of the essential foundation of the American governmental structure.<sup>153</sup>

In this, the court proceeded from the “historically unescapable” statement that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>154</sup>

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150. *Id.* at 580 (plurality opinion).

151. *Id.*

152. *Id.* at 581.

153. *Id.*

154. *Id.* To prove the historical necessity of the proposition, the court cataloged official references to the Christian God:

No historical fact is so easy to prove by literally countless illustrations as the fact that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of government and society. The references to the Deity in the Declaration of Independence; the words of our National Anthem: “In God is our trust”; the motto on our coins; the daily prayers in Congress; the universal practice in official oaths of calling upon God to witness the truth; the



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Judge Froessel's concurrence framed the question strangely by asking: "Do the Federal and State Constitutions prohibit the recitation by children in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country?"<sup>155</sup> Judge Froessel found that the act of reverence to God "is clearly nonsectarian in language and neither directly nor indirectly even suggests belief in any form of organized or established religion."<sup>156</sup>

It seems clear that Judge Froessel believed the act of reverence to God did not constitute an establishment of religion because he knew that belief in God was ubiquitous. His explanation was patronizing and disrespectful of atheists and adherents of non-monotheistic faith traditions:

History and common experience teach us that the perception of a Supreme Being, commonly called God, is experienced in the lives of most human beings. Some, it is true, escape it, or think they do for a time. In any event, that perception is manifest, independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith – indeed, the common denominator. One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a "law respecting an establishment of religion" . . . .<sup>157</sup>

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official thanksgiving proclamations beginning with those of the Continental Congress and the First Congress of the United States and continuing till the present; the provisions for chaplaincies in the armed forces; the directions by Congress in modern times for a National Day of Prayer and for the insertion of the words "under God" in the Pledge of Allegiance to the Flag; innumerable solemn utterances by our Presidents and other leaders. . . .

*Id.*

155. *Id.* at 582 (Froessel, J., concurring).

156. *Id.*

157. *Id.* The plurality opinion is also disrespectful in tone. *See id.* at 580 (plurality opinion) ("Petitioners, taxpayers in the district and parents of children attending the schools and all (except one 'non-believer') being members of various religious bodies . . . .").

Judge Froessel used the religious preamble of the New York constitution, and the religious preambles of the other states, to support his argument.<sup>158</sup>

It is understood that the requirement that public schools perform an act of reverence to the Christian God, as approved in *Engel*, in part on the authority of the religious preamble to the New York and other constitutions, also violates the Establishment Clause. This is because on appeal the Supreme Court struck down the New York “act of reverence to God” as being “a practice wholly inconsistent with the Establishment Clause.”<sup>159</sup> Writing for the Court, Justice Black confirmed that the Regents’ prayer was a religious activity.<sup>160</sup> The New York prayer, written by the state, was a clear Establishment Clause violation because:

[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that, in this country, it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.<sup>161</sup>

The Court forcefully rejected New York’s claim that its prayer comported with the Establishment Clause because it was

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158. *Engel*, 176 N.E.2d at 582–83 (Froessel, J., concurring). As Judge Froessel explained:

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing “America”, the fourth stanza of which is indeed a prayer, invoking the protection of “God”, “Author of Liberty”. The preamble of our State Constitution, which is taught in our public schools, provides: “We the People of the State of New York, grateful to Almighty God for our Freedom”. Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government, unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding.

*Id.* (citations omitted).

159. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

160. *Id.* at 424–25 (“There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this, and the trial court expressly so found . . .”).

161. *Id.* at 425.

nondenominational and allowed for students and their parents to opt out of participation.<sup>162</sup> The Court found against New York on both the neutrality and voluntary prongs of the argument:

[I]gnores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.<sup>163</sup>

The Court concluded, and further rejected New York's nondenominational claim, by quoting James Madison:

[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one

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162. *Id.* at 430 (“There can be no doubt that New York’s state prayer program officially establishes the religious beliefs embodied in the Regents’ prayer. The respondents’ argument to the contrary, which is largely based upon the contention that the Regents’ prayer is “nondenominational” and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer, but permits those who wish to do so to remain silent or be excused from the room . . .”).

163. *Id.* at 430–31. The Court continued: “But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.” *Id.* at 431. This is why Conservative Christian blogger and talk radio host Donna Calvin’s anticipatory Establishment Clause defense of her Christian nation argument—“Please note that at no time is anyone told that they MUST worship God”—is misplaced. Calvin, *Watchwoman*, *supra* note 40.

establishment may force him to conform to any other establishment in all cases whatsoever?<sup>164</sup>

##### 5. What Constitutes Religious Worship?

In 1982 the Georgia Supreme Court decided *Roberts v. Ravenwood Church of Wicca*,<sup>165</sup> a case that examined whether a Wiccan church was entitled to a property tax exemption under a statute which granted an exemption to all “places of religious worship.”<sup>166</sup> The majority held that the practice of Wicca constituted “religious worship,” and reversed the denial of the tax exemption.<sup>167</sup>

In his dissent, the Chief Justice Robert Jordan argued that the Wiccans were not engaged in religious worship.<sup>168</sup> He stated:

In defining religion, the majority opinion adopts the basic guide stated by Justice Hughes: “The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.” In my opinion the Wiccan faith does not meet this test. Lady Sintana, the founder of Ravenwood, refers to herself as “a pagan and a witch.” Male followers are called “warlocks.” Each individual is connected to everything in the universe by what is known as the “karmic circle.” There is no belief in a deity in the sense of an anthropomorphic God, only a belief in some strange supernatural force which permeates the world.<sup>169</sup>

Chief Justice Jordan then invoked the religious preamble of the Georgia constitution to advance his narrow definition of what constituted religious worship:

Under that nebulous premise, there could be as many “places of religious worship” as there are homes or tents where humans meditate on the mysteries of life. It would certainly include places in which Satanic cults worship a supernatural evil force which dominates the world. I do not believe that such cults or beliefs qualify as a religion under the meaning of that term as understood by our founding fathers

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164. *Engel v. Vitale*, 370 U.S. at 436 (quoting James Madison, *Religious Assessments*, in II WRITINGS OF MADISON 183, 185–186 (Gaillard Hunt ed., 1901)).

165. *Roberts v. Ravenwood Church of Wicca*, 292 S.E.2d 657 (Ga. 1982).

166. *Id.* at 658.

167. *Id.* at 660. The narrow issue, whether commercial activities carried on in part of the place of worship negated the tax exemption for the entire facility, was decided in favor of the Wiccans. *See id.*

168. *Id.* at 660 (Jordan, C.J., dissenting).

169. *Id.*

when they drafted the Constitution of the State of Georgia “relying upon the protection and guidance of Almighty God.”<sup>170</sup>

The Chief Justice concluded by returning to the preamble to exclude Wicca from the definition of religious worship:

While the majority opinion states that the Wiccan church does not believe in the devil, I do not believe it conforms to the traditional concept of a religion embraced in the preamble of our State Constitution and as expressed in the Pledge of Allegiance to the flag of the United States. This nation was founded “under God,” not the “karmic circle.”<sup>171</sup>

Today, Wicca is a recognized religion.<sup>172</sup> Those who have Wiccan religious beliefs do not have to submit to the type of bigotry and disrespect evidenced in Chief Justice Jordan’s dissent in *Ravenwood Church of Wicca*.<sup>173</sup> And although Lady Sintana, the founder of the Ravenwood Church and Seminary of Wicca, “passed into the Summerland” in 2010,<sup>174</sup> the Wiccan House of Ravenwood survives.<sup>175</sup>

## V. CONCLUSION

The United States is a nation greatly in need of reconciliation. One of the dimensions along which Americans long for reunion is the

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170. *Id.*

171. *Id.* at 660–61.

172. The *Ravenwood* majority proved correct as to the religious characterization of Wicca. Three years after *Ravenwood*, a federal district court addressed the issue:

[Wicca is] clearly a religion for First Amendment purposes . . . . Members of the Church sincerely adhere to a fairly complex set of doctrines relating to the spiritual aspect of their lives, and in doing so they have “ultimate concerns” in much the same way as followers of more accepted religions. Their ceremonies and leadership structure, their rather elaborate set of articulated doctrines, their belief in the concept of another world, and their broad concern for improving the quality of life of others gives them at least some facial similarity to other more widely recognized religions.

173. *Ravenwood Church*, 292 S.E.2d at 660–661.

174. Candace Lehrman White, known as Lady Sintana, died on September 17, 2010. She was survived by her husband, Lord Merlin, her daughter, Lady Sybil, her grandson, and a son-in-law. See *In Remembrance of Lady Sintana*, HOUSE OF RAVENWOOD, <http://www.houseofravenwood.org/LadySintana.html> (last visited Aug. 12, 2018); Jason Pitzl-Waters, *Lady Sintana (Candace Lehrman White) 1937–2010*, THE WILD HUNT (Sept. 18, 2010), <http://wildhunt.org/2010/09/lady-sintana-candace-huntsman-lehrman-19xx-2010.html>.

175. See HOUSE OF RAVENWOOD, <http://www.houseofravenwood.org/index.html> (last visited Aug. 12, 2018).

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diversity of our religious beliefs. Amendment of our religious state constitution preambles would be a small step in that process.

The preambles are intended to have no substantive purpose; their importance is symbolic. They lead citizens such as Donna Calvin into the error of arguing that the United States is a Christian nation and calling upon her co-religionists to “take our country back for God.”<sup>176</sup> As such, the provisions should be amended.

The preambles have been invoked to support a variety of practices that are now understood to violate the Establishment Clause. They were used to support inappropriate religious monuments on courthouse grounds, censorship of films, religious instruction in public schools, official prayers in public schools, and discriminatory interpretations of what constitutes a religion. As such, the provisions should be amended.

However, the most compelling reason for amending the preambles is that the preambles divide us as a people and make reconciliation on matters of religious faith harder. Because they place some citizens at a remove based on their religious beliefs, the preambles, like all the other forms of ceremonial deism, are disrespectful and needlessly divisive.

Today, almost one in three Americans profess non-Christian views on matters of religion. People differ as to whether that represents, in Jefferson’s view, progress of the human mind in which new discoveries are made and new truths disclosed, and that is a question as to which no government should opine. However, Americans should be able to agree that our circumstances have changed as to matters of religious faith, and that, as Jefferson counseled, our institutions should advance to reflect that change.

In his 1992 Memorial Day proclamation, President George H. W. Bush movingly reminded us of the humanity of those who have sacrificed for the nation. “Each of the patriots whom we remember on this day,” he observed, “was first a beloved son or daughter, a brother or sister, or a spouse, friend, and neighbor.”<sup>177</sup> They are, in short, “We, the People.” One cannot walk among the white markers at Arlington National Cemetery without gaining a better understanding of President Bush’s words.<sup>178</sup>

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176. Calvin, *Preamble*, *supra* note 39.

177. Proclamation No. 6442, 57 Fed. Reg. 22,143 (May 26, 1992) (proclamation by President George H. W. Bush entitled, “Prayer for Peace Memorial Day, 1992”).

178. Author Anthony Gaughan has observed: “There are few locations in the country that compare to Arlington as a source of national unity and pride.” Anthony J. Gaughan,

The evolving diversity of religious belief in the nation makes the path of amendment more obvious and the case for amendment more compelling. The evolution does not, however, change the fact that the nation has always had a diversity of thought on matters of religion, and thus, the religious preambles to our state constitutions have always been inappropriate, as a further walk through Arlington illustrates.

In Section 60 is Grave 8048, the resting place of Mitchell Rogers Johnson, who was in the Army during Vietnam. He served in the Army for 52 years, ultimately rising the rank of Command Sergeant Major. The white stone marking his grave bears a stylized lotus flower, indicating his Soka Gakkai faith.<sup>179</sup>

Section 54 is near the main entrance of the cemetery. Grave 4676 in that section is the grave of Melvin D. Kutzer, who served in the Army during World War II and the Korean War, rising to the rank of Major. He was on General MacArthur's staff and operated in military intelligence. The white stone marking his grave bears the circle and "V" symbol, indicating his United Church of Religious Science faith.<sup>180</sup>

Not far distant in Section 54 is Grave 2861, the resting place of Abraham M. Kooiman, who served as a Private First class in the Army during World War II, earning the Combat Infantry Badge, a Purple Heart, and a Bronze Star. The white stone marking his grave bears a Pentacle, indicating his Wiccan faith.<sup>181</sup>

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THE LAST BATTLE OF THE CIVIL WAR: UNITED STATES VERSUS LEE, 1861–1883, at 1 (2011).

179. *Mitchell Rogers Johnson*, FIND A GRAVE, <https://www.findagrave.com/memorial/21313776> (last visited Aug. 12, 2018); Blumberg, *supra* note 2; NCA, *Available Emblems*, *supra* note 2.

180. See Melvin D. Kutzer Burial Detail, ARLINGTON NAT'L CEMETERY EXPLORER, <https://ancexplorer.army.mil/publicwmv/> (select "Find a Grave Site"; then search last name field for "Kutzer" and first name field for "Melvin") (last visited Aug. 12, 2018); *Melvin D. Kutzer Obituary*, LEGACY (July 14, 2002), <https://bit.ly/2vAZvTS>; NCA, *Available Emblems*, *supra* note 2.

181. See Abraham M. Kooiman Burial Detail, ARLINGTON NAT'L CEMETERY EXPLORER, <https://ancexplorer.army.mil/publicwmv/> (select "Find a Grave Site"; then search last name field for "Kooiman" and search first name field for "Abraham") (last visited Aug. 12, 2018); *Abraham M. Kooiman Obituary*, LEGACY (Jan. 9, 2003), <https://bit.ly/2P2M332>; NCA, *Available Emblems*, *supra* note 2. Abraham was a Wiccan and a founder of the Nomadic Chantry of the Gramarye. See Joe Holley, *Rosemary Kooiman; Championed Witches Rights*, WASH. POST (Mar. 10, 2006), <https://wapo.st/2w4d51h>. He was survived by his wife, Rosemary Kooiman, who in 1998 was denied a clergy license after a Virginia court ruled that Wicca did not qualify as a religion. With the intervention of the ACLU, she received a clergy license later that year. *Id.*

Across Arlington, is Grave 5-1 in Section 21, the final resting place of Rae Diana Landy, who rose to the rank of Lieutenant Colonel in the Army Nurse Corps while serving in both World War I and World War II. The white stone marking her grave bears a Star of David, indicating her Jewish faith.<sup>182</sup>

Mitchell Johnson was from Georgia, Melvin Kutzer from Florida, Abraham Kooiman from Maryland, and Rae Landy from Ohio. Because of their respective faiths, their states placed them at a remove from “We the People” by the preambles to their state constitutions.<sup>183</sup>

An especially significant Arlington grave for our purpose is in Section 3, one of the oldest parts of the cemetery. There, in grave 1620, lies Robert G. Ingersoll, who served as a Colonel and commander of the 11th Illinois Volunteer Cavalry in the Grand Army of the Republic during the Rebellion. He fought at Shiloh and was captured by the Rebels. A celebrated orator, Ingersoll was one of the leading agnostics of the 19th Century. He was a resident of New York at the time of his death. The New York constitution, the preamble of which placed him at a remove from his fellow citizens based solely on his views on matters of religion, was passed only five years before his death.<sup>184</sup> The white stone marking Robert Ingersoll’s grave is unadorned with the symbol of his agnosticism,<sup>185</sup> but is appropriately inscribed to commemorate both his service in war and his contributions in peace: “Nothing is grander than to

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182. See Rae D. Landy Burial Detail, ARLINGTON NAT’L CEMETERY EXPLORER, <https://ancexplorer.army.mil/publicwmv/> (select “Find a Grave Site”; then search last name field for “Landy” and search first name field for “Rae”) (last visited Aug. 12, 2018); Beth DiNatale Johnson, *Rae D. Landy, 1885–1952*, JEWISH WOMEN’S ARCHIVE ENCYCLOPEDIA, <https://jwa.org/encyclopedia/article/landy-rae-d> (last visited Aug. 12, 2018); NCA, *Available Emblems*, *supra* note 2.

183. FLA. CONST. pmb. (“We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty . . . .”); GA. CONST. pmb. (“To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, *relying upon the protection and guidance of Almighty God*, do ordain and establish this Constitution.”) (emphasis added); MD. CONST. pmb. (“We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty . . . .”); OHIO. CONST. pmb. (“We, the people of the State of Ohio, grateful to Almighty God for our freedom . . . .”).

184. N.Y. CONST. pmb. (1894) (“We, the people of State of New York, grateful to Almighty God for our freedom . . . .”).

185. Graves at Arlington were not marked with religious symbols until after World War I. See *Jewish war veterans dead but not forgotten at Arlington*, ARLINGTONCEMETERY.NET, <http://www.arlingtoncemetery.net/jews.htm> (last updated DEC. 2, 2000).



break chains from the bodies of men – nothing nobler than to destroy the phantoms of the soul.”<sup>186</sup>

Our state constitutions should never have placed these or any Americans at a remove from their fellow citizens based solely on their beliefs on matters of religion. For all these reasons, the religious preambles should be amended.

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186. *Robert Green Ingersoll*, FIND A GRAVE, <https://www.findagrave.com/memorial/2668/robert-green-ingersoll> (last visited Aug. 12, 2018). Today, the Arlington graves of atheists and agnostics can be marked in several ways. See NCA, *Available Emblems*, *supra* note 2 (listing emblems that can be inscribed on the graves of fallen veterans; number 16 is the atheist atomic whirl, and number 32 is the American Humanist Association symbol).